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1 BRIAN R. STRANGE (SBN 103252)
 lacounsel@earthlink.net
 2 GRETCHEN CARPENTER (SBN 180525)
 gcarpenter@strangeandcarpenter.com
 3 STRANGE & CARPENTER
 12100 Wilshire Blvd., Suite 1900
 4 Los Angeles, CA 90025
 Telephone: 310-207-5055
 5 Fax: 310-826-3210

6 RANDALL S. ROTHSCHILD (SBN 101301)
 randy.rothschild@verizon.net
 7 12100 Wilshire Blvd., Suite 800
 Los Angeles, CA 90025
 8 Telephone: 310-806-9245
 Fax: 310-988-2723

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 10 Attorneys for Plaintiffs Vivian Fiori and Roggie Trujillo

11 *CH/*
 12 UNITED STATES DISTRICT COURT
 13 FOR THE NORTHERN DISTRICT OF CALIFORNIA

14 SAN JOSE DIVISION

C 09 Case No. 01518 PVT

15 VIVIAN FIORI and ROGGIE TRUJILL
 16 on behalf of themselves and all others similarly
 17 situated,

18 Plaintiffs,

19 vs.

20 DELL INC., a corporation; BANCTEC, INC.,
 21 a corporation; QUALXSERV LLC, an entity;
 DELL CATALOG SALES, L.P., an entity;
 DELL PRODUCTS, L.P., an entity; DELL
 MARKETING L.P., an entity; DELL
 MARKETING L.P., LLC, an entity; DELL
 MARKETING G.P., LLC, an entity; DELL
 USA, L.P., an entity; and DOES 1 Through
 10,

22 Defendants.

23 COMPLAINT FOR:

1. VIOLATION OF THE SONG-BEVERLY CONSUMER WARRANTY ACT, CALIFORNIA CIVIL CODE §§ 1790, *et seq.*
2. VIOLATION OF THE CONSUMERS LEGAL REMEDIES ACT, CALIFORNIA CIVIL CODE §§ 1750, *et seq.*
3. VIOLATION OF CALIFORNIA BUSINESS & PROFESSIONS CODE §§ 17500, *et seq.*
4. VIOLATION OF CALIFORNIA BUSINESS & PROFESSIONS CODE §§ 17200, *et seq.*

24 DEMAND FOR JURY TRIAL

25 CLASS ACTION

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1 Plaintiffs Vivian Fiori and Roggie Trujillo, on behalf of themselves and all other similarly
 2 situated persons in the State of California, allege as follows:

3 **NATURE OF THE CASE**

4 1. This suit concerns Defendants' deceptive business practice of secretly charging
 5 Dell customers for onsite repair service for the first year after they purchased their Dell
 6 computers. Because the hidden charges are never disclosed – except in Defendants' internal
 7 invoicing which is never shown to the customer -- customers are completely unaware they have
 8 paid for an onsite service contract they never knew they were purchasing, let alone consent to
 9 buying.

10 2. This case is brought as a California only class action on behalf of California
 11 consumers based upon service contracts sold and to be performed here. California is also where
 12 all the injuries in issue took place.

13 3. Class action treatment is appropriate as this matter involves a scheme to
 14 deliberately cheat large numbers of consumers out of individually small sums of money through
 15 a uniform course of conduct involving standardized business practices, common material
 16 omissions, and substantially identical pre-preprinted form documentation. Plaintiffs are
 17 informed and believe and thereon allege that the individual sums in issue are typically in the
 18 range of \$60-\$120, the exact amount being in the exclusive knowledge of the Defendants.

19 **JURISDICTION**

20 4. This Court has subject matter jurisdiction under the Class Action Fairness Act of
 21 2005, 28 U.S.C. § 1332(d), because members of the proposed California statewide Class are
 22 citizens of California, a different state from Defendants, which are incorporated and have
 23 principal places of business in Texas, Delaware or Massachusetts. The aggregate amount in
 24 controversy exceeds \$5,000,000. Furthermore, Defendants Dell Inc.; Banctec, Inc.; QualxServ
 25 LLC; Dell Catalog Sales, L.P.; Dell Products, L.P.; Dell Marketing, L.P.; Dell Marketing L.P.,
 26 LLC; Dell Marketing G.P., LLC; and Dell USA, L.P. (hereafter "**Defendants**") have
 27 purposefully availed themselves of the benefits and protections of this District and/or have had
 28 sufficient contacts with this District such that maintenance of the action in this locale is

1 consistent with traditional notions of fair play and substantial justice.

2 **INTRA-DISTRICT ASSIGNMENT**

3 5. Pursuant to Civil Local Rule 3-2(c), this case should be assigned to the San Jose
 4 Division of this Court, as San Benito County is the residency of the Plaintiffs and where a
 5 substantial part of the events or omissions which give rise to Plaintiffs' claims occurred.

6 **PARTIES**

7 6. Plaintiff Vivian Fiori and Plaintiff Roggie Trujillo are residents of San Benito
 8 County, California, and were residents of California at the time they purchased the goods and
 9 services in issue through the time of filing this action.

10 7. Plaintiffs are informed and believe and thereon allege that defendant Dell Inc. is a
 11 corporation organized under the laws of the State of Delaware, with its principal place of
 12 business in Round Rock, Texas, and was formerly known as "Dell Computer Corporation." Dell
 13 Inc. is engaged in the business of manufacturing, marketing, selling, retailing, maintaining,
 14 repairing, servicing, and providing support for computer systems and computer products. Dell
 15 Inc. is also engaged in the business of making, marketing, selling, and retailing service contracts
 16 for the repair of Dell computers, including the ones involved in this case. In addition, Dell Inc. is
 17 engaged in the business of repairing, servicing, and providing support for onsite warranty repair
 18 services to purchasers of Dell computer systems, including the onsite warranty repair services at
 19 issue in this case.

20 8. Plaintiffs are informed and believe and thereon allege that defendants Dell
 21 Catalog Sales, L.P.; Dell Products, L.P.; Dell Marketing, L.P.; Dell Marketing L.P., LLC; Dell
 22 Marketing G.P., LLC; and Dell USA, L.P. are wholly-owned subsidiaries and/or affiliates
 23 through which Dell Inc. conducts its business. Dell Inc. and the foregoing Dell defendants have
 24 been or are the principals, agents, employees, representatives, partners, joint venturers and/or
 25 co-conspirators of each other and, in such capacity or capacities, participated in the acts or
 26 conduct alleged herein and incurred liability therefor. Further, Plaintiffs are informed and
 27 believe and thereon allege that Defendants Dell Catalog Sales, L.P.; Dell Products, L.P.; Dell
 28 Marketing, L.P.; Dell Marketing L.P., LLC; Dell Marketing G.P., LLC; and Dell USA, L.P. are,

1 and at all times herein mentioned were, the alter egos of Defendant Dell Inc., and there exists,
 2 and at all times herein mentioned has existed, a unity of interest and ownership between such
 3 Dell defendants and Dell Inc. such that any separateness between them has ceased to exist, in that
 4 Defendant Dell Inc. completely controls, dominates, manages, and operates Dell Catalog Sales,
 5 L.P.; Dell Products, L.P.; Dell Marketing, L.P.; Dell Marketing L.P., LLC; Dell Marketing G.P.,
 6 LLC; and Dell USA, L.P. to the detriment of Plaintiffs and class members. Adherence to the
 7 fiction of the existence of Dell Catalog Sales, L.P.; Dell Products, L.P.; Dell Marketing, L.P.;
 8 Dell Marketing L.P., LLC; Dell Marketing G.P., LLC; and Dell USA, L.P. as entities separate
 9 and distinct from Dell Inc. would permit an abuse of corporate privileges and would sanction a
 10 fraud and promote injustice.

11 9. Collectively, all of the Dell defendants will hereafter be referred to as “**Dell**” or
 12 “**Dell Defendants**.” Thus, “**Dell**” or “**Dell Defendants**” includes Dell Inc.; Dell Catalog Sales,
 13 L.P.; Dell Products, L.P.; Dell Marketing, L.P.; Dell Marketing L.P., LLC; Dell Marketing G.P.,
 14 LLC; and Dell USA, L.P.

15 10. Plaintiffs are informed and believe and thereon allege that defendant Banctec, Inc.
 16 (“**Banctec**”) is a corporation organized under the laws of the State of Delaware with its principal
 17 place of business located in Irving, Texas. Banctec is engaged in the making, marketing, selling,
 18 and retailing of service contracts for the repair of Dell computers. Banctec is also engaged in the
 19 business of repairing, servicing, and providing support for onsite warranty repair services to
 20 purchasers of Dell computer systems, including the onsite warranty repair services at issue in this
 21 case. Further, Banctec, along with Dell and defendant Qualxserv LLC, sells service contracts to
 22 California residents for the repair of Dell computers, including the ones involved in this case, and
 23 Banctec provides onsite repair services to Dell customers in California through its employees
 24 who are located here.

25 11. Plaintiffs are informed and believe and thereon allege that defendant QualxServ
 26 LLC (“**Qualxserv**”) is a limited liability company organized under the laws of the State of
 27 Delaware with its principal place of business located in Tewksbury, Massachusetts. Qualxserv is
 28 engaged in the making, marketing, selling, and retailing of service contracts for the repair of Dell

1 computers. Qualxserv is also engaged in the business of repairing, servicing, and providing
2 support for onsite warranty repair services to purchasers of Dell computer systems, including the
3 onsite warranty repair services at issue in this case. Further, Qualxserv, along with Dell and
4 Banctec, sells service contracts to California residents for the repair of Dell computers, including
5 the ones involved in this case, and Qualxserv provides onsite repair services to Dell customers in
6 California through its employees who are located here.

7 12. Plaintiffs are informed and believe and thereon allege that with respect to the
8 claims asserted herein, each of the Defendants has been or is the principal, agent, employee,
9 representative, partner, joint venturer and/or co-conspirator of each of the other Defendants and
10 in such capacity or capacities participated in the acts or conduct alleged herein and incurred
11 liability therefor. Further, at all times relevant hereto, each of the Defendants has been or is the
12 agent, partner and/or joint venturer of each other Defendant with respect to the making,
13 marketing, selling, maintaining, repairing, servicing, and providing warranty services, parts and
14 labor to purchasers of Dell computer systems, including the onsite warranty repair services at
15 issue. Each Defendant derived, accepted and retained monetary profits and benefits from the sale
16 of the service contracts in issue. Further, each of the Defendants acted for and on behalf of each
17 other Defendant with respect to the service contracts, with actual and apparent authority to act,
18 and did so within the course and scope of their agency, partnership, joint venture and/or
19 authority. With regard to the specific warranties, representations and agreements alleged herein,
20 each was made with the knowledge, consent, authorization, ratification and approval of each of
21 the Defendants.

22 13. More specifically, Banctec and Qualxserv participated in and profited from all of
23 the business practices and policies alleged herein with full knowledge of the facts, and were fully
24 aware of the material omissions and business practices and policies in issue which were
25 committed on their behalf as well as on behalf of Dell.

26 14. The true names and capacities, whether individual, corporate, associate or
27 otherwise, of Defendant Does 1-10, inclusive, are unknown to Plaintiffs, who therefore sue such
28 Defendants by such fictitious names. Plaintiffs will amend this Complaint to show such

1 Defendants' true names or capacities when the same have been ascertained. Plaintiffs are
 2 informed and believe and thereon allege that each of said fictitious named Defendants is
 3 responsible in some manner for the occurrences herein alleged.

4 **California Regulation**

5 15. The service contracts that are the subject of this dispute were all sold in California
 6 to California residents for use in California on Dell computers located here. As such, the service
 7 contracts in issue, as well as any onsite repair services performed thereunder, are statutorily
 8 regulated by the State of California through the Business and Professions Code §§ 9800, *et seq.*,
 9 the Song-Beverly Act (Civil Code §§ 1790, *et seq.*), and Title 16 of the California Code of
 10 Regulations, Division 27. Further, Defendants, as sellers of the service contracts as well as being
 11 providers of repair services, are regulated in California by the Bureau of Electronic and
 12 Appliance Repair as "service dealers" pursuant to § 9801(f) of the California Business and
 13 Professions Code, as "service contract sellers" or "sellers" pursuant to subsection c of § 9855 of
 14 that Code, as well as "service contractors" pursuant to § 9855(e). Plaintiffs are informed and
 15 believe and thereon allege that as sellers of service contracts and providers of repair services in
 16 California, Defendants are required to be registered with the State of California, and that
 17 Defendants are either presently registered or have been in the past.

18 **GENERAL ALLEGATIONS**

19 **Defendants' Common Practice**

20 16. Dell sells desktop and laptop computers directly to consumers through its website
 21 as well as over the telephone through its sales representatives. Dell computers are broadly
 22 advertised in California to California consumers through various media, including Dell's
 23 website, mail order catalogs, newspapers, television and the Internet.

24 17. Dell, on behalf of itself and all Defendants, advertises and represents that warranty
 25 repairs for Dell computers are made onsite for the first year after purchase. As a matter of
 26 business policy and practice common to all their customers, including Plaintiffs and class
 27 members, Defendants secretly charge Dell customers for this first year onsite repair service
 28 without the customer's knowledge or informed consent. This charge is hidden from the customer

1 and never disclosed by Defendants either prior to, at the time of, or after the sale of a Dell
2 computer.

3 18. Further, Defendants' standard policy is that the service contracts for the first year
4 after purchase are optional and do not have to be bought by the customer. However, in
5 furtherance of their scheme to deceive, Defendants never disclose this standard policy or option
6 to the customer prior to, at the time of, or after the sale of a Dell computer. As a result, the
7 customers are completely unaware they are being charged for the first year onsite repair service,
8 or even that they had the option not to be charged in the first place.

9 19. Also in furtherance of the scheme, Defendants memorialize every computer sale
10 in writing by way of a standard Invoice or Acknowledgment (see example attached as Exhibits 1-
11 2). These Invoices are sent to Dell customers after they purchase a computer as a matter of
12 Defendants' standard business practice. The Invoices do not list a charge for the first year
13 service contract, nor do they disclose that the customer has been charged for a first year onsite
14 service contract. In contrast, as a matter of Defendants' standard business practice, the charge for
15 the service contract is clearly and conspicuously listed in Defendants' internal invoicing that is
16 never shown to the customer.

17 20. Similarly, Defendants, as a matter of standard business practice, make available to
18 Dell customers a copy of their standard service contract that, again, fails to disclose that there
19 was any charge for the service contract or for the onsite repair service.

20 21. Plaintiffs are informed and believe and thereon allege that Defendants charge the
21 customer somewhere between \$60 to \$120 for this onsite service for the first year, the exact
22 amount being in the exclusive knowledge of Defendants.

23 22. Given the foregoing practices and policies, buyers of Dell computers, as
24 reasonable consumers, reasonably believe there is no charge for first year onsite warranty repair
25 service. As buyers and reasonable consumers, customers purchasing Dell computers, including
26 Plaintiffs and class members, would reasonably expect that if Defendants, as sellers, imposed a
27 charge for the first year onsite repair service, such a cost would be clearly and conspicuously
28 disclosed to buyers before or at the time of sale.

1 23. In addition, as buyers and reasonable consumers, customers purchasing Dell
2 computers, including Plaintiffs and class members, would reasonably expect that if they had the
3 option and choice whether or not to purchase onsite repair service for the first year, Defendants,
4 as sellers, would clearly and conspicuously disclose this option to them before or at the time of
5 sale. Taken together, customers purchasing Dell computers, including Plaintiffs and class
6 members, would reasonably expect that if a charge existed for the first year onsite repair service,
7 Defendants would clearly and conspicuously disclose to them the full details of the charge, as
8 well as disclose to them their option and choice whether to incur the extra charge or not.

9 **Uniform Omissions and Standard Documentation**

10 24. Defendants' policy and standard business practices as alleged herein, are common
11 to all Dell customers, including Plaintiffs and class members. Further, Defendants made the
12 same uniform omissions and lack of disclosures to all Dell customers, including Plaintiffs and
13 class members, and irrespective of whether the customers purchased their computers at Dell's
14 website or over the telephone from Dell's sales representatives. Defendants' uniform omissions
15 were material in inducing Plaintiffs and class members to incur, without their knowledge or
16 consent, charges for their first year onsite repair service through the unintentional purchase of a
17 service contract.

18 25. In addition, Defendants provided Dell customers, including Plaintiffs and class
19 members, with the same or substantially the same uniform standard documentation, including
20 substantially identical form invoices and pre-printed form service contracts. Defendants drafted
21 all sales documentation, and are in a superior bargaining position from their customers, including
22 Plaintiffs and class members. Customers, including Plaintiffs and class members, have no input
23 or ability to negotiate any of the terms of these "take it or leave it" form adhesion documents.

24 **Defendants' Motives**

25 26. Plaintiffs are informed and believe and thereon allege that the reason Defendants
26 engage in the deceptive acts alleged herein is to allow them to substantially increase sales of Dell
27 computers and increase profits. Plaintiffs are informed and believe and thereon allege that, since
28 Dell has no retail outlets, Defendants believe that if they did not provide their customers with

1 onsite repair service for the first year after purchase, they would be at a substantial competitive
 2 disadvantage to box-store retailers such as Best Buy which offers their customer the convenience
 3 of returning a broken computer to any store for warranty service. Defendants attempt to
 4 counteract this advantage by offering to come to a customer's home to fix their computer if it is
 5 broken but, to maintain high profits, they force the customer to secretly pay for this service
 6 option. Without the onsite repair service, Dell customers would be forced to package-up their
 7 computer and mail it to a Dell repair facility for warranty repair.

8 27. Plaintiffs are also informed and believe and thereon allege that Defendants believe
 9 that if they did not conceal the charge for this onsite service, Defendants fear that potential
 10 customers would find it more attractive to purchase their computers at a store where warranty
 11 repair options are both free and more convenient, rather than pay a premium price for
 12 Defendants' promise to fix their Dell computers onsite at some time in the future. Plaintiffs are
 13 also informed and believe and thereon allege that sales of service contracts are a high profit
 14 margin business for Defendants which provides them further incentive for the scheme.

15 **Fiori Service Contract**

16 28. On or around September 5, 2003, Plaintiff Vivian Fiori purchased a Dell computer
 17 for her personal, family and household use through Dell's website, and did use the computer for
 18 her personal, family and household use. She selected the computer she wanted from among
 19 various different choices presented on the Dell website. According to the written representations
 20 and advertising Defendants made on the website, which Plaintiff Fiori read before making her
 21 computer purchase, warranty repairs for her computer would be made onsite for the first year
 22 after purchase.

23 29. Plaintiff Fiori was provided no option to delete or eliminate the first year onsite
 24 repair service. Further, Defendants made no disclosure on the website that there was any charge
 25 or cost associated with the first year onsite repair service. Nor was there any disclosure on the
 26 website giving Plaintiff the option of just purchasing the computer without the onsite repair
 27 service for a lesser price.

28 ///

1 30. Based on the foregoing, and as a reasonable consumer, Plaintiff reasonably
2 concluded there was no charge for the first year onsite repair service. Plaintiff reasonably
3 expected that if there was a charge for the first year onsite service, Defendants would clearly
4 disclose this cost prior to or at the time of the sale. Further, Plaintiff reasonably expected that if
5 there was a charge or cost associated with the onsite service for the first year of purchase,
6 Defendants would have provided an option prior to or at the time of the sale for Plaintiff to
7 purchase the computer without the onsite service.

8 31. Relying upon the foregoing lack of disclosures, and not knowing that there
9 actually was a charge for the onsite service, Plaintiff made her purchase of the computer through
10 Dell's website on or about September 5, 2003. She did this with a credit card payment that
11 Defendants immediately accepted.

12 32. Defendants, pursuant to their standard business practice, sent Plaintiff Fiori a
13 written Acknowledgment Invoice dated September 12, 2003 memorializing her purchase. (A
14 true and correct redacted copy of the front of this Invoice is attached hereto as Exhibit 1.) The
15 Invoice, pursuant to Defendants' standard business practice, did not list a price for the initial, or
16 first year, onsite repair service, and did not indicate anywhere that she had been charged the price
17 for a service contract. Further, and also pursuant to Defendants' established business practice,
18 nowhere on the Invoice did Defendants disclose to Plaintiff that there was a charge for her first
19 year onsite repair service or that Defendants had actually charged Plaintiff for the cost of a
20 service contract. Nor did Defendants disclose to Plaintiff anywhere on the Invoice that she had
21 the option to purchase the computer without incurring a charge for the onsite repair service and
22 service contract.

23 33. Plaintiff is also informed and believes and thereon alleges that, pursuant to
24 Defendants' standard business practice, Defendants made available to her a pre-printed form
25 service contract for the onsite service. As with the Invoice, Plaintiff is informed and believes and
26 thereon alleges that nowhere on the form did Defendants disclose there was any charge for the
27 first year onsite service or that Plaintiff had the option not to have this onsite service for the first
28 year after purchase.

1 34. Plaintiff Fiori discovered within the last year as a result of an unrelated legal
2 proceeding that Defendants had secretly charged her for onsite warranty repair service during the
3 first year after purchase through the undisclosed sale of a service contract to her. Defendants
4 concealed and suppressed the true facts from Plaintiff and never disclosed them to Plaintiff
5 before or after her computer purchase took place. Plaintiff Fiori had no knowledge that she was
6 charged for onsite service through a service contract, and never agreed or consented to this
7 charge.

8 35. If Defendants had disclosed the charge for the first year onsite repair service and
9 service contract prior to or at the time of sale, Plaintiff Fiori would have been aware of it, would
10 have acted differently, and would not have purchased the onsite service through the purchase of a
11 service contract. Likewise, if Defendants had disclosed to her prior to or at the time of sale that
12 the onsite service costs extra money and that she had the option not to purchase it, Plaintiff Fiori
13 would have been aware of it, would have acted differently, and would have chosen the option not
14 to have the onsite service and service contract for the first year.

15 36. Plaintiff is informed and believes and thereon alleges that the cost of the first year
16 onsite repair service and service contract that she unwittingly purchased without her consent,
17 ranged from approximately \$60 to \$120. The exact cost of the first year onsite service is
18 presently unknown to Plaintiff, and remains within Defendants' exclusive knowledge.

19 **Trujillo Service Contract**

20 37. On or around March 23, 2004, Plaintiff Vivian Fiori purchased through Dell's
21 website another Dell computer, this time on behalf of her mother, Plaintiff Roggie Trujillo, for
22 her mother's personal, family and household use in California. Plaintiff Trujillo delegated to her
23 daughter, as her agent for purposes of buying the computer, full authority and discretion to buy
24 the same type or substantially similar computer as her daughter had purchased the prior year.
25 Plaintiff Trujillo wanted the computer for her personal, family and household use, and Plaintiff
26 Trujillo did use the computer for her personal, family and household use. Prior to and at the time
27 of the purchase of her mother's computer in March, 2004 ("the Trujillo computer"), neither
28 Plaintiff Fiori nor Plaintiff Trujillo were aware that Defendants secretly charge customers for a

1 first year service contract as part of the transaction. If they had known about the charge, they
2 would have chosen not to purchase the service contract.

3 38. On behalf of her mother, Plaintiff Fiori selected the same type of computer she
4 had previously purchased for herself from among the various choices presented on Dell's
5 website. According to the written representations and advertising Defendants made on the
6 website, which Plaintiff Fiori read before making the purchase of the Trujillo computer, warranty
7 repairs for the computer would be made onsite for the first year after purchase.

8 39. In purchasing the Trujillo computer, Plaintiff Fiori was provided no option to
9 delete or eliminate the first year onsite repair service. Further, Defendants made no disclosure on
10 the website that there was any charge or cost associated with the first year onsite repair service.
11 Nor was there any disclosure on the website giving Plaintiffs the option of just purchasing the
12 computer without the onsite repair service for a lesser price.

13 40. Based on the foregoing, and as a reasonable consumer, Plaintiff Fiori, on behalf of
14 herself and her mother, reasonably concluded there was no charge for the first year of onsite
15 repair service for the Trujillo computer. Plaintiffs reasonably expected that if there was a charge
16 for the first year onsite service, Defendants would clearly disclose this cost prior to or at the time
17 of the sale. Further, Plaintiffs reasonably expected that if there was a charge or cost associated
18 with the onsite service for the first year of purchase, Defendants would provide an option prior to
19 or at the time of the sale for Plaintiffs to purchase the computer without the onsite service.

20 41. Relying upon the foregoing lack of disclosures, and not knowing that there
21 actually was a charge for the onsite service, Plaintiff Fiori, on behalf of her mother, purchased the
22 Trujillo computer through Dell's website on or about March 23, 2004, and paid for it with
23 Plaintiff Fiori's credit card. Defendants accepted payment immediately. Plaintiff Fiori was
24 subsequently reimbursed by her mother for the cost of the Trujillo computer.

25 42. Defendants, pursuant to their standard business practice, sent a written
26 Acknowledgment Invoice dated April 9, 2004 memorializing the purchase of the Trujillo
27 computer. (A true and correct redacted copy of the front of the Invoice is attached hereto as
28 Exhibit 2.) The Invoice, pursuant to Defendants' standard business practice, did not list a price

1 for the initial, or first year, onsite repair service, and did not indicate anywhere that the customer
2 had been charged the price for a service contract. Further, and also pursuant to Defendants'
3 established business practice, nowhere on the Invoice did Defendants disclose that there was a
4 charge for her first year onsite repair service or that Defendants had actually charged for the cost
5 of a service contract. Nor did Defendants disclose anywhere on the Invoice that the customer had
6 the option to purchase the computer without incurring a charge for the onsite repair service and
7 service contract.

8 43. Plaintiffs are also informed and believe and thereon allege that, pursuant to
9 Defendants' standard business practice, Defendants made available a pre-printed form service
10 contract for the onsite service. As with the Invoice, Plaintiffs are informed and believe and
11 thereon allege that nowhere on the form did Defendants disclose there was any charge for the
12 first year onsite service or that the customer had the option not to have this onsite service and
13 save herself the cost of the service.

14 44. Plaintiff Trujillo, as did Plaintiff Fiori, discovered within the last year as a result
15 of an unrelated legal proceeding that Defendants had secretly charged for the first year onsite
16 warranty repair service for the Trujillo computer. Defendants concealed and suppressed the true
17 facts from Plaintiffs and never disclosed them to Plaintiffs before or after the Trujillo computer
18 purchase took place. Neither Plaintiff Trujillo nor Plaintiff Fiori had any knowledge that they
19 were being charged for onsite service for the Trujillo computer through a service contract, and
20 neither Plaintiff ever agreed or consented to this charge.

21 45. If Defendants had disclosed to Plaintiffs prior to or at the time of sale that there
22 was a charge for the first year onsite repair service and service contract, Plaintiffs would have
23 been aware of it, would have acted differently, and would not have purchased the onsite service.
24 Likewise, if Defendants had disclosed to Plaintiffs prior to or at the time of the sale of the
25 Trujillo computer that the onsite service costs extra money and that they had the option not to
26 purchase it, Plaintiffs would have been aware of it, would have acted differently, and would have
27 chosen the option not to have the onsite service and service contract for the first year.

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46. Plaintiffs are informed and believe and thereon allege that the cost of the first year onsite repair service that they unknowingly purchased for the Trujillo computer without their knowledge or informed consent, ranged from approximately \$60 to \$120. The exact cost of the first year onsite service is presently unknown to Plaintiffs, and remains within Defendants' exclusive knowledge.

CLASS ACTION ALLEGATIONS

47. Plaintiffs bring this action on behalf of themselves and all others similarly situated as representatives of the following class:

All individuals in the State of California who purchased a Dell desktop or notebook computer system and who also received the right to have onsite warranty repair service during the first year after purchase. Excluded from the class are employees of Defendants, their officers, directors, subsidiaries and affiliates (the "Class").

12 48. This action has been brought and may properly be maintained as a class action,
13 satisfying the numerosity, commonality, typicality, adequacy, and superiority requirements of
14 Rule 23 of the Federal Rules of Civil Procedure.

15 49. Members of the Class are so numerous that joinder of all members is
16 impracticable. Plaintiffs do not know the exact size of the Class since such information is in the
17 exclusive control of Defendants. The exact numbers, however, may be determined by
18 appropriate discovery. Plaintiffs believe that the Class members number at least in the
19 thousands.

20 50. There are questions of fact and law common to the Class which common
21 questions predominate over any questions affecting only individual members. Those common
22 questions include whether Defendants engaged in the following conduct and whether such
23 conduct is improper and wrongful:

- A. Charging Plaintiffs and plaintiff Class members for onsite warranty repair service through the undisclosed sale of a service contract without their knowledge or consent.
- B. Failing to clearly and conspicuously disclose to Plaintiffs and plaintiff Class members prior to, at the time of, and after the purchase of their Dell

computers that they were being charged for the cost of their first year onsite warranty repair service through the undisclosed sale of a service contract.

- C. Failing to clearly and conspicuously disclose to Plaintiffs and plaintiff Class members prior to, at the time of, and after the purchase of their Dell computers that they had the option not to incur the cost of their first year onsite warranty repair service and service contract.
- D. Carrying out a scheme designed to deliberately cheat large numbers of persons out of individually small sums of money.

10 51. The claims of the Representative Plaintiffs are typical of the claims of the Class as
11 all members of the Class are similarly affected by Defendants' wrongful conduct.

12 52. The Representative Plaintiffs will fairly and adequately represent and protect the
13 interests of the Class. They have no interests that conflict with or are antagonistic to the interests
14 of the Class. The Representative Plaintiffs have retained experienced and competent attorneys
15 who are experienced in class action litigation and who will fairly and adequately protect the
16 interests of the Class.

17 53. All Class members have the same legal rights to, and interest in, the subject matter
18 of this action, which are substantially similar, if not identical, for Plaintiffs and plaintiff Class
19 members.

20 54. The class action is an appropriate method for fair and efficient adjudication of the
21 controversy given the following:

- A. Common questions of law and/or fact predominate over any individual questions that may arise, such that there would be enormous economies to the courts and the parties in litigating the common issues on a classwide, instead of a repetitive individual, basis;
- B. Class members' individual damage claims are too small to make individual litigation an economically viable alternative;

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- C. Despite the relatively small size of individual Class members' claims, their aggregate volume, coupled with the economies of scale inherent in litigating similar claims on a common basis, will enable this case to be litigated as a class action on a cost-effective basis, especially when compared with repetitive individual litigation; and
- D. No unusual difficulties are likely to be encountered in the management of this class action in that all or substantially all questions of law and fact to be litigated are common to the Class.

9 55. Class certification is fair and efficient as well because prosecution of separate
10 actions would create a risk of adjudications with respect to individual members of the Class,
11 which as a practical matter, may be dispositive of the interests of other members not parties to
12 the adjudication or substantially impair or impede their ability to protect their interests. In
13 addition, Defendants have acted or refused to act on grounds generally applicable to all members
14 of the Class, thereby making final injunctive relief concerning the Class as a whole appropriate.

FIRST CAUSE OF ACTION

FOR VIOLATION OF THE SONG-BEVERLY CONSUMER

WARRANTY ACT, CALIFORNIA CIVIL CODE §§ 1790, *et seq.*

(Plaintiffs, on Behalf of Themselves and All Class Members, Against All Defendants)

19 56. Plaintiffs reallege and incorporate by reference paragraphs 1-55 above into this
20 claim for relief with the same force and effect as though these paragraphs were set forth at length
21 herein.

57. Every service contract sold to a consumer in California for services to be
rendered in this State is controlled and governed by the Song-Beverly Consumer Warranty Act,
California Civil Code §§ 1790, *et seq.*, including § 1794.41(a). Any waiver of a buyer of a
service contract of consumer goods falling under this Act is contrary to public policy and is
unenforceable and void under Civil Code § 1790.1.

27 58. Plaintiffs and plaintiff Class members are "buyers" and the computers in issue are
28 "consumer goods" and "home electronic products" as these terms are defined under California

1 Civil Code § 1791. At all times herein alleged, Dell is a “manufacturer” and each Defendant is a
 2 “retail seller,” “seller” and/or “retailer” as those terms are defined in California Civil Code §
 3 1791. The onsite service repair contracts at issue are “service contracts” as defined in California
 4 Civil Code § 1791, as well as a “service contract covering a home electronic product” as those
 5 terms are used in California Civil Code § 1794.41. Further, pursuant to § 9855 of the California
 6 Business and Professions Code, each of the Defendants is a “service contract seller or seller” and
 7 “service contractor” as those terms are defined in subsections c and e, and the onsite service
 8 repair contracts at issue are “service contracts” as defined in § 9855(a). As a result, the
 9 provisions of §§ 1794.4 and 1794.41 of the Song-Beverly Consumer Warranty Act also apply to
 10 Defendants pursuant to Business and Professions Code § 9855.5.

11 59. In doing the acts alleged above, Defendants have carried out a scheme designed to
 12 deliberately cheat large numbers of consumers out of individually small sums of money. In
 13 furtherance of this scheme, Defendants breached § 1794.41(a)(1) of the Song-Beverly Consumer
 14 Warranty Act by, among other things, failing to comply with the requirements and disclosures of
 15 subsection (a) of section 1794.4 in failing to fully and conspicuously disclose the charges for the
 16 onsite repair service and service contract in issue, and that this onsite service and service contract
 17 were optional. In addition, Defendants violated § 1794.4(c)(5)(I) by failing to accurately and
 18 completely disclose all “fees, charges, and other costs that the buyer must pay to obtain service.”

19 60. Plaintiffs and Class members have been damaged by Defendants’ failure to
 20 comply with their obligations under the Song-Beverly Consumer Warranty Act with respect to
 21 their service contracts.

22 61. As a proximate result of Defendants’ actions, Plaintiffs and members of the
 23 plaintiff Class have suffered substantial monetary and non-monetary damage and are entitled to
 24 injunctive relief to stop the offensive practices in issue as well as damages for all monies
 25 unknowingly paid for the onsite repair service plus all applicable civil penalties and attorneys’
 26 fees and costs pursuant to Civil Code § 1794.

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SECOND CAUSE OF ACTION

**FOR VIOLATION OF THE CONSUMERS LEGAL REMEDIES ACT,
CALIFORNIA CIVIL CODE §§ 1750, *et seq.***

(Plaintiffs, on Behalf of Themselves and All Class Members, Against All Defendants

62. Plaintiffs reallege and incorporate by reference paragraphs 1-55 above into this claim for relief with the same force and effect as though these paragraphs were set forth at length herein.

63. This cause of action is brought on behalf of Plaintiffs and Class members pursuant to the Consumers Legal Remedies Act, California Civil Code §§ 1750, *et seq.* (the "CLRA").

The CLRA applies to Defendants' actions and conduct described herein. Any waiver by Plaintiffs and Class members of the provisions of the CLRA is contrary to public policy and is unenforceable and void under Civil Code § 1751.

64. Plaintiffs and Class members bought Dell computers primarily for personal, family, or household use and are thus “consumers” within the meaning of California Civil Code § 1761(d). The computers that Plaintiff and each member of the plaintiff Class bought are “goods” within the meaning of California Civil Code § 1761(a), and the onsite repair service and service contract in issue is a “service” within the meaning of California Civil Code § 1761(b). This matter, involving the purchase of Dell computers and the unknowing purchase of service contracts, constitutes a “transaction” within the meaning of California Civil Code § 1761(e).

65. In doing the acts alleged herein, Defendants have carried out a scheme designed to deliberately cheat large numbers of consumers out of individually small sums of money. In furtherance of this scheme, Defendants engaged in a number of proscribed practices under § 1770 of the CLRA, namely § 1770(a)(5), (9), (14) and (15). These provisions proscribe as follows:

(a) The following unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer are unlawful:

(5) Representing that goods or services have ... characteristics, ... [or] benefits ... which they do not have ...

- (9) Advertising goods or services with intent not to sell them as advertised. ...
- (14) Representing that a transaction confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law. ...
- (15) Representing that a part, replacement, or repair service is needed when it is not.

6 66. Defendants' material omissions in failing to disclose their charges to Plaintiffs
7 and Class members for their first year onsite service and service contract, and their failure to
8 disclose the customer's option not to have the onsite service and service contract in the first place
9 as more fully alleged above, is a violation of the CLRA and breach of the proscribed practices
10 described above. Further, these acts were likely to mislead the members of the public and
11 reasonable consumers, including Plaintiffs and plaintiff Class members, and which did mislead
12 members of the public and reasonable consumers, including Plaintiffs and plaintiff Class
13 members.

14 67. Plaintiffs and Class members request that this Court enjoin Defendants from
15 continuing to employ the unlawful methods, acts and practices alleged above, pursuant to
16 California Civil Code § 1780(a)(2). Unless Defendants are permanently enjoined from
17 continuing to engage in such violations of the CLRA, current and future consumers of
18 Defendants' products will be affected in the same way as have Plaintiffs and members of the
19 Class. Plaintiffs do not seek damages under this CLRA claim for relief at this time.

THIRD CAUSE OF ACTION

**FOR FALSE AND MISLEADING ADVERTISING IN VIOLATION OF
CALIFORNIA BUSINESS & PROFESSIONS CODE §§ 17500, *et seq.***

(Plaintiffs, on Behalf of Themselves and All Class Members, Against All Defendants

24 68. Plaintiffs reallege and incorporate by reference paragraphs 1-55 above into this
25 claim for relief with the same force and effect as though these paragraphs were set forth at length
26 herein.

27 69. Dell computers are broadly advertised to California consumers through various
28 media, including through Dell's website, mail order catalogs, newspapers, television and the

1 Internet. Defendants, with full knowledge that there is a charge for first year onsite service repair
2 and that this service is optional, intentionally and deceptively mislead consumers, including
3 Plaintiffs and Class members, into believing that there was no charge for first year onsite service
4 through their advertising and statements, including their invoices and service contracts. The
5 advertising and statements fail to disclose all material and relevant information, namely, that
6 there was a charge for the onsite service for the first year of ownership, and that this onsite
7 service, which is sold through a service contract, was optional and customers had the choice not
8 to buy it.

9 70. Defendants' advertisements and statements were likely to deceive or mislead or
10 had the capacity, likelihood or tendency to deceive or confuse the consuming public, including
11 Plaintiffs and Class members. As a result, Defendants' acts and conduct in making and
12 disseminating the advertising and statements before the public in California were false and
13 misleading within the meaning, and in violation, of California Business & Professions Code §
14 17500.

15 71. Further, to the extend it is found that Defendants conditioned the sale of their
16 computers with the sale of a service contract, Defendants are in breach of California Business &
17 Professions Code § 17509(a) for failing to clearly and conspicuously disclose and list the price
18 for the onsite service contract separate and apart from the price of the computer in their
19 advertising and statements when soliciting purchasers for Dell computers.

20 72. In doing the acts alleged above, Defendants have carried out a scheme designed to
21 deliberately cheat large numbers of consumers out of individually small sums of money. As a
22 proximate result of Defendants' actions, Plaintiffs and members of the Class are entitled to
23 injunctive relief, restitution of all moneys wrongfully obtained from Plaintiffs and members of
24 the Class, and disgorgement.

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FOURTH CAUSE OF ACTION

FOR UNFAIR, DECEPTIVE, AND UNLAWFUL BUSINESS

PRACTICES IN VIOLATION OF CALIFORNIA BUSINESS & PROFESSIONS CODE

§§ 17200, *et seq.*

(Plaintiffs, on Behalf of Themselves and All Class Members, Against All Defendants)

73. Plaintiffs reallege and incorporate by reference all of the paragraphs above into this claim for relief with the same force and effect as though these paragraphs were set forth at length herein.

9 74. Defendants' actions alleged above, such as their failing to disclose the onsite
10 service contract charge or that the onsite service was optional for the first year, constitute
11 unlawful and unfair and fraudulent business practices and acts under California Business and
12 Professions Code §§ 17200, *et seq.* These actions and business practices are forbidden by law,
13 create harm that outweighs any benefit to customers, and are likely to deceive members of the
14 public. Further, Defendants' actions also constitute unfair and deceptive and untrue and
15 misleading advertising pursuant to section §§ 17200, *et seq.*

16 75. In doing the acts alleged above, Defendants have carried out a scheme designed to
17 deliberately cheat large numbers of consumers out of individually small sums of money.
18 Plaintiffs and plaintiff Class members have suffered injury in fact and have lost money in at least
19 the amount they unknowingly paid for the first year service contract, as a result of Defendants'
20 unfair competition and deceptive advertising as defined in Business and Professions Code §§
21 17200, *et seq.*

22 76. In addition, the acts and practices of Defendants are unlawful because they violate
23 one or more of the following statutes and regulations:

26 b) Consumers Legal Remedies Act, Cal. Civil Code §§ 1750, *et seq.*, as set
27 forth above.

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c) Song-Beverly Consumer Warranty Act, Cal. Civil Code §§ 1790, *et seq.*, as set forth above.

d) 16 C.C.R. § 2720 of the California Administrative Code, which provides that “[n]o service dealer shall, in filling out an estimate or an invoice, withhold therefrom or insert therein any statement or information where the tendency or effect thereby is to mislead or deceive customers, prospective customers, or the consuming public.”

77. Defendants' acts and practices as described herein have deceived and/or are likely to deceive members of the consuming public and reasonable consumers, including Plaintiffs and Class members.

78. Unless Defendants are enjoined from continuing to engage in the unlawful, unfair, fraudulent, untrue and deceptive acts and practices described herein, Plaintiffs and members of the Class will continue to be damaged by Defendants' unfair business practices.

79. Defendants, through their acts of unfair competition and unfair, deceptive, untrue and misleading advertising, have acquired money from Plaintiffs and Class members. Thus, Plaintiffs and plaintiff Class members request that this Court restore this money to them, enjoin Defendants from continuing to violate California Business & Professions Code §§ 17200, *et seq.*, and order disgorgement.

WHEREFORE, Plaintiffs requests the following relief, on behalf of themselves and on behalf of the Class:

1. An order confirming that this action is properly maintainable as a class action and appointing Plaintiffs and their counsel to represent the Class:

2. Except for the CLRA claim, an award of damages, restitution, punitive damages, civil penalties, and all other monetary relief authorized by law or referenced herein;

3. An order enjoining Defendants from charging customers for first year onsite repair warranty services without conspicuously disclosing this cost to customers and their option not to purchase the onsite service in the first place, and from engaging in unfair competition and deceptive advertising and acts and practices as set forth in or related to the allegations herein;

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1 4. Except for the CLRA claim, an award of prejudgment interest and post-judgment
2 interest;

3 5. Except for the CLRA claim, an award providing for payment of costs of suit,
4 including payment of experts' fees and expenses;

5 6. Except for the CLRA claim, an award of reasonable attorneys' fees; and

6 7. Except for the CLRA claim, such other and further relief as this Court may deem
7 proper and just.

8 DATED: April 7, 2009

Respectfully submitted,

RANDALL S. ROTHSCHILD, APC

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11 By:

Randall Rothschild
Randall S. Rothschild
by OC
12 Attorneys for Plaintiffs

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DEMAND FOR JURY TRIAL

Plaintiffs hereby demand a trial by jury.

DATED: April 7, 2009

Respectfully submitted,

RANDALL S. ROTHSCHILD, APC

By

Randall Rothchild
Randall S. Rothchild by GC
Attorneys for Plaintiffs